IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
CONFIRMATION CASE NO.2 OF 2006
(Referecne made by 3rd Ad-hoc. Addl.Sessions Judge,
Nashik.)

With

Criminal Appeal No.590 of 2006

The State of Maharashtra — Complainant (Respondent)

Vs.

1. Ankush Maruti Shinde
2. Rajya Appa Shinde
3. Ambadas Laxman Shinde
4. Raju Mhasu Shinde
5. Bapu Appa Shinde
6. Surya @ Suresh
S/o. Nagu @ Gangaram Shinde — Accused (Appellants)

Mrs.Usha Kejriwal, APP for State.

Mr.A.P.Mundargi, Senior Counsel with Mr. Subodh Desai for accused-appelants.

CORAM: B.H.MARLAPALLE & R.S. MOHITE, JJ.

Reserved on : March 08, 2007.
Pronounced on : March 22, 2007.

JUDGMENT (PER B.H.MARLAPALLE,J.)

1. This Confirmation Case submitted under Section 366 of Cr.P.C. arises from the judgment and order dated 12th June 2006 deciding Sessions Case No.43 of 2004 by the learned 3rd Ad-hoc Addl. Sessions Judge at Nashik, convicting and sentencing six out of the

seven accused for the offences punishable under Sections 395, 302 read with Section 34, 376(2)(g), Section 307 read with Section 34 and Sections 396, 397 and 398 of IPC. All the accused have been awarded the death penalty for the offence punishable under Section 302 read with Section 34 of IPC. The operative part of the order of conviction and sentence reads as under:

". The Accused Nos. (1) Ankush Maruti Shinde, (2) Rajya Appa Shinde, (3) Ambadas Laxman Shinde, (4) Raju Mhasu Shinde, (5) Bapu Appa Shinde and (6) Surya alias Suresh s/o. Nagu alias Gangaram Shinde are convicted for the offences punishable under Sections 395, 302 read with Section 34 of Indian Penal Code, Sections 376(2)(g), 307 r.w. 34 of Indian Penal Code, Sections 396, 397 r.w. 395 and Sec. 398 of Indian Penal Code.

2. The offence punishable under Section 397 r.w. 395 of Indian Penal Code is proved. It includes offences punishable under Sections 395 and 398 of Indian Penal Code, so no separate punishments are given for the same.

3. The Accused Nos.1 to 6 are convicted for the offence punishable under Section 302 r.w. 34 of Indian Penal Code.

. They are sentenced to death for the offence punishable under Section 302 r.w. 34 of Indian Penal Code. It is directed that they be hanged by their necks till they are dead. The sentence is subject to the confirmation by the Hon'ble High Court.

4. The Accused Nos.1 to 6 are convicted for the offence punishable under section 376(2)(g) of Indian Penal Code and they are sentenced to suffer R.I. for a period of 10 years with fine of Rs.200/- each. In default of payment of fine, to suffer further R.I. for a period of 1 month each.

5. The Accused Nos.1 to 6 are convicted for the offence punishable under Section 307 r.w. 34 of Indian Penal Code. They are sentenced to suffer R.I. for 5 years each with fine of Rs.200/- each. In default of payment of fine to suffer further R.I. for a period of 1 month each.

6. The Accused Nos.1 to 6 are convicted for the

offence punishable under Section 397 r.w. section 395 of Indian Penal Code. They are sentenced to suffer R.I. for a period of 7 years each with fine of Rs.200/- each. In default of payment of fine to suffer further R.I. for 1 month each.

7. The Accused Nos.1 to 6 are convicted for the offence punishable under Section 396 of Indian Penal Code. And they are sentenced to suffer R.I. for 10 years each with fine of Rs.200/- each. In default of payment of fine to suffer further R.I. for 1 month each.

8. The Accused Nos.1 to 6 are acquitted of the offence punishable under section 135 of Bombay Police Act.

9. All the sentences to run concurrently".

All the convicted accused have filed Criminal Appeal No.590 of 2006 against the said order of conviction and sentence.

2. Shri Raghunath Devram Hagwane (PW 6) is an

agriculturalist and businessman having his agricultural land in Survey No.15/3 on Belatgavan Shivar and part of the agricultural land was having a guava orchard, he had given the same on contract to Shri Trambak Eknath Satote who was staying in a hut/shed erected on the said agricultural land along with his family members (wife, three sons and one daughter). On 6/6/2003 he received a telephonic call from his nephew Vishnu Hagwane (PW 12) at about 6.30 a.m. stating that Trambak and his sons and daughter were lying in bleeding condition in the hut and they were perhaps dead. Raghunath who was having his house in Survey No.19 immediately rushed to the spot in his jeep and noticed that Trambak's elder son Manoj (PW 1) and wife Vimalabai (PW 8) were murmuring but unconscious and, therefore, he immediately shifted both of them to the Municipal Hospital called Bytco hospital at Nashik. Vishnu (PW 12) had also intimated to the police simultaneously and, therefore, they arrived at the spot and noticed that Trambak, his two sons viz. Sandeep and Bhurya @ Shrikant, daughter Savita and his sister-in-law's son Bharat More were found dead. The police also noticed bleeding injuries on the dead bodies. Inquest panchanamas at Exhibits 26 to 30 were carried out

with Suresh Jaware (PW 2) being one of the panchas for the same. Spot panchanama at Exhibit 31 was drawn with Shankar Ghule (PW 3) as one of the panch witnesses. Near the hut / shed there was a well at a distance of about 400 to 500 ft. and from its three sides guava plantation was existing. Well panchanama at Exhibit 34 was drawn with Dada Kashinath Palde (PW 5) as a panch witness. The dead bodies were sent to the Municipal Hospital at Sinnar and Dr. D.M.Gadakh (PW 9) along with Dr. P.M. Wagh conducted the post mortem of all the five dead bodies (Exhibits 81, 86, 89, 91 and 93). Death certificates were also issued by the said doctor in addition to separate certificates regarding cause of death in each case. The certificate at Exhibit 83 stated that Savita, aged about 15 years was raped before she was dead. PW 1 Manoj regained his consciousness at about 7 a.m. on 6/6/2003 and PW 8 Vimalabai regained her consciousness at about 9.30 p.m. on the same day while at the Bytco hospital. PW 1 Manoj filed his complaint which came to be registered as an FIR (Exhibit 23). His statement was recorded by the Special Judicial Magistrate at about 12.00 hrs. on 6/6/2003 (Exhibit 178) and the statement of mother Vimalabai (PW 8) was recorded at Exhibit 189 by

Gavane (PW 23) and at the relevant time Police Inspector at Chandvad police station at about 9.45 p.m. Both the injured were shifted to the Government hospital at Nashik on 7/6/2003.

3. As per the prosecution case on 5/6/2003 Trambak and all his family members as well as the guest Bharat More were chitchatting after dinner and at about 10.30 p.m. seven to eight unknown persons entered his hut and all of them were on banyan and half pant and they started threatening the family members. They demanded money as well as ornaments and Trambak took out Rs.3000/- from his pocket and handed over to one of them. Some of the gang members forcibly took away the mangalsutra as well as ear-tops and dorley from the person of Vimalabai, ear-tops from the person of Savita and silver rings which were around her feet. From the person of Manoj they removed a silver chain and a wrist watch. Thereafter they went out of the hut and consumed liquor. After some time they re-entered the hut with weapons like knife, axe handle, sickle, spade with handle and yokpin etc., so as to rob the house members and collect more money and ornaments etc. They started beating the family members and Trambak

was the first person who received assault. Sandeep and other members of the family told the dacoits to take away whatever they could collect from the house but no family members should be assaulted. At this stage Sandeep was assaulted and so also Shrikant @ Bhurya, Bharat and Manoj. The dacoits did not spare Vimalabai as well. They tied hands and legs of all the family members except Manoj and Vimalabai. As a result of assault Manoj, Trambak, Sandeep, Shrikant and Bharat had fallen unconscious. Three of the dacoits dragged Savita out of the hut and took her to the guava garden. Two of the dacoits then picked up Vimalabai and dragged her towards the well. One of them raped her near the well and then she was taken to the guava garden where Savita was taken. Vimalabai was assaulted and brought back to the hut. After some time the three dacoits brought Savita back but in naked condition and with injuries on her body. When the dacoits had entered the hut at about 10.30 p.m. the light bulb in the hut was burning and TV was on. The dacoits increased the volume of the tape recorder and after they dropped Savita in the hut, they put on shoes and started walking on the persons lying injured and they thought that all of them were dead. Vimalabai (PW 8) lost her consciousness around

12 O'Clock in the night and till then the dacoits were present in the hut and they left the hut under the belief that all of the victims were dead. However, PW 1 Manoj and his mother PW 8 Vimalabai survived. They are the eye witnesses to the prosecution case.

4. The clothes from the dead bodies of five deceased persons as well as the clothes on the person of Manoj and Vimalabai were seized. From the spot some weapons like wooden handle, spade with handle, yokpin and sickle were also seized. The seized articles were sent for chemical analysis and CA reports from Exhibit 58 to Exhibit 72 were received. In view of the gravity of the incidence the police machinery was obviously under tremendous pressure and it sought assistance from the neighbouring districts like Ahmednagar, Aurangabad, Jalgaon and Dhule etc. The first breakthrough came on 23/6/2003 when accused nos.1 and 2 came to be arrested under arrest panchanamas (Exhibits 44 and 45) by the Crime Branch. The police during the course of investigation also got information that some other accused were also involved in a separate crime registered with the police station at Bhokardhan in Jalna district on

19/6/2003 and the police, therefore, filed an application before the competent Court seeking transfer of the accused in Crime No.74 of 2003 registered with the Bhokardhan police station and finally accused nos.3 to 5 came to be arrested on 27/6/2003 under arrest panchanamas (Exhibits 53, 54 and 55) after their custody was transferred from the police station at Bhokardhan. On the arrest of accused nos.1 to 5 their clothes were seized and they were subjected to medical examination. Dr. Satish Vasant Shimpi (PW 16) had examined accused nos.3, 4 and 5 on 27/6/2003 and issued medical certificates at Exhibits 133 to 135. Of these three accused, accused No.4 - Raju Mhasu Shinde was seen to have sustained injuries within three weeks. Accused nos.1 and 2 were examined by Dr.Vilas Patil (PW 24) on 23/6/2003. Both the accused were seen to have sustained injuries about three weeks back and the medical certificates were issued at Exhibits 195 and 196. We have seen the case diary maintained by the I.O. during the course of investigation and it is evident that the statements of Sunita wife of Raja Shinde was recorded at Exhibit 77A in the presence of Ibrahim Wazir Shaikh (PW 7) on 25/6/2003.

. Test identification parade of the accused nos.1 to 5 was held on 25/7/2003 in the jail premises and PW 1 Manoj identified the five accused as the unknown persons who had entered their hut and assaulted the family members. PW 8 Vimalabai also identified Accused Nos.1, 3, 4 and 5 as the unknown persons who had entered the hut and assaulted the family members. She however, could not identify accused no.2 - Raja Appa Shinde. Whereas accused no.6 came to be arrested on 7/10/2004 and his TI parade was held on 9/10/2004. Both PW 1 and PW 8 had identified the said accused who was one of the unknown persons who entered their hut and assaulted the family members. The test identification report at Exhibit 120 was proved through the evidence of the Special Executive Magistrate, Ramesh Sonawane (PW 13).

5. On completion of the investigation charge-sheet came to be filed and the case was committed to the Sessions Court. The learned 5th Ad-hoc Addl. Sessions Judge at Nashik framed the charge in Sessions Case No.43 of 2004 vide her order dated 13/6/2005. The prosecution initially examined 24 witnesses including four doctors i.e. PW 9 Dr.

Gadakh, PW 15 - Nalini Shardul, PW 16 - Dr. Satish Shimpi and PW 24 - Dr. Vilas Patil. The police personnel examined by the prosecution were PW 10 - Vitthal Chaudhari, PW 11 - Bapu Sonawane, Police Naik, PW 13 - Ramesh Sonawane, Special Executive Magistrate, PW 17 Narayan Shinde, PSI, PW 18 Bhaskarrao Dhas, Asst. Commissioner of Police who had investigated the case, PW 19 Bhimsing Thakur, In-charge of Dog Squad at Dhule, PW 20 - Kashinath Bharate, Police Inspector who had also investigated the crime. PW 21 - Ramesh Patil, Senior P.I., Ambad Police Station, Nashik who had conducted the investigation for two days, PW 22 - Shafiuddin Sayyed, P.I. Traffic Branch and who had recorded the complaint (FIR at Exhibit 23) of Manoj PW 1 and PW 23 - Sharad Gavane, P.I. Chandwad Police Station who had also investigated the crime at some stage. The others were panch witnesses i.e. PW 2 - Suresh Mohan, PW 3 - Shankar Tukaram Ghule, PW 4 - Bharat Narayan, PW 5 - Dada Kashinath Palde, Police Patil, PW 7 - Ibrahim Shaikh.

6. Criminal Application No.1 of 2006 was filed by the State of Maharashtra and Criminal Application No.2 of 2006 was filed by the accused persons before

this Court. By the common order dated 14th November 2006 in both these applications the following directions were issued:

(i) The prosecution be allowed to lead additional evidence of the Sub-Divisional Magistrate who conducted the test identification parade in relation to accused Nos.1 to 5 and all relevant documents pertaining thereto.

(ii) The defence be permitted to recall and cross-examine PW-8 in relation to Exh. 122 which is already on record.

(iii) In the event contradictions are established on record in the cross-examination of PW-8, the learned Trial Judge should also recall PW-13 for directions of those contradictions, if any.

(iv) Since the matter of confirmation is pending, it is desired that the necessary recording of additional evidence be completed before 7th of January, 2007. List the matter

for further orders in relation to hearing on 9th January, 2007. The record may be transmitted to the Trial Court for this purpose."

. Consequently PW 8 and PW 13 were further cross-examined by the defence and the prosecution examined one additional witness i.e. Shri Govind Alhate, City Magistrate at Nashik as PW 25. He had conducted the TI parade of accused nos.1 to 5 on 25/7/2003. Through his evidence the additional documents at Exhibits 217 to 229 were brought on record. Exhibits 224 to 228 are the memorandum of TI parade of each of the accused nos.1 to 5 and Exhibit 229 is the explanation submitted by the Sub-Divisional Magistrate. The said explanation states that at the time of TI parade held on 25/7/2003 the police personnel staff were not present, TI parade was conducted by the Magistrate himself, before the TI parade commenced the witnesses were not given any opportunity to see the accused, the accused were allowed to stand at any number they wanted and for every witness the accused concerned was permitted to change his clothes. In addition the

accused and the six dummies were made to stand in one line and finally the witness had identified the accused.

7. It has come in the evidence of PW 9 Dr. Gadakh that the dead persons had received multiple injuries externally as well as internally. At this stage it would be appropriate to note down the injuries so noticed and recorded in the P.M. reports.

I. Miss Savita Trambak Satote (age - 15 yrs.)

External injuries:

(1) CLW above right eye brow with dimensions as 5 cm. x 3 cm. x 5 cm.

(2) CLW above right eye brow medially 1 cm. x 1 cm.

(3) Contusion below right eye brow of 3 cm. x 3 cm. in dimensions.

(4) CLW above left eye brow of 3 cm. x 1 cm. x 5 cm.

(5) CLW on lateral angle of right eye 1 cm. x 1 cm.

(6) CLW on right upper lip of 1 cm. x 1 cm.

(7) Abrasion on right nape of neck of 2 cm. x 2 cm.

(8) Abrasion on left side of back 10 cm. x 3 cm.

(9) Abrasion on left shoulder posteriorly 3 cm. x 2 cm.

(10) Abrasion on right shoulder 3 cm. x 3 cm.

(11) Contusion on left side of chest wall 3 cm. x 3 cm.

(12) Abrasion on right side of chest wall 1 cm. x 1 cm.

(13) Valval oedema present, bluish discolouration

of vaginal mucosa, hymen ruptured, bleeding through vagina present.

Internal injuries :

Head :

(1) subcutanery haematoma on frontal region.

(2) Skull normal except harding fracture at frontal bone horizontal 4 cm. in length.

(3) Subdural haematoma on right frontal, 6 cm. x 5 cm.

Cause of death :

Intracarnial haemorrhage due to fracture of skull.

II. Trambak Eknath Satote (age - 50 yrs.)

External injuries:

(1) Abrasion on left clavicle region of 2 cm x 1 cm.

(2) Abrasion on right clavicle region 3 cm x 1 cm.

(3) Abrasion on supra sternal knotch 3 cm x 2 cm.

(4) Abrasion below left ear 2 cm x 1 cm.

Internal injuries :

(1) Fracture of rib of left side and left haemo-thorax of about 1 & 1/2 Lt.

Cause of death :

Acute cardio respiratory arrest due to haemorrhagic shock.

III. Bhurya @ Shrikant Trambak Satote (age-8 yrs.)

External injuries:

(1) CLW on lateral to left eye 1 x cm. skin deep.

(2) Contusion on left cheek from left ear to angle of moth. 3 cm. in breadth and brownish discoloured.

(3) CLW over occipital region 3 cm. x 1 cm. bone deep.

Internal injuries:

(1) subcutaneous haematoma over left frontal parietal region and over occipital region 3 cm x 1 cm in size.

(2) Skull fracture horizontal on frontal bone 3 cm. in length.

(3) Intracerebral haemorrage present in brain. Big haematoma fronto over left parieta and occipital region. Big clot at the base of skull.

Cause of Death:

Intracravical haemorrhage due to head injury.

IV. Sandeep Trambak Satote (age - 17 yrs.)

External injuries :

(1) Contusion on right cheek about 4 x 3 cm.

(2) Incised wound on right side of chest wall 1 x 1/2 x 1/2 cm.

Internal injuries :

(1) Haematoma of left temporo-parietal region of scalp.

(2) Brain showed left temporal parietal haematoma about 7 cm. x 5 cm. and intra ventricular bleeding present.

cause of Death :

Shock due to head injury.

V. Bharat Ashok More (age 14 yrs.)

External injuries:

(1) Incised wound on left chest near nipple of 2 x 1 cm. and skin deep.

(2) Contusion on left side of chest laterally to the nipple of size 5 x 3 cm.

(3) Abrasion on abdomen of 2 x 2 cm. over left hypochondria.

Internal injuries:

(1) Thorax showed fracture of ribs No.4 and 5 at anterior axillary line of left side.

Cause of death:

Cardio respiratory arrest due to haemorrhagic shock due to blunt injury to chest.

. From the above medical evidence it is very

clear that all the five persons Savita, Trambak, Bhurya @ Shrikant, Sandeep and Bharat died a homicidal death. The P.M. notes also indicated that the death could have taken place about 4 to 6 hours after the last meals. It has come in the evidence of PW 1 - Manoj and PW 8 - Vimalabai that the family members had taken meals around 9 p.m. on 5/6/2003 and, therefore, Trambak, Sandeep, Savita, Shrikant and Bharat could be said to have died between 1 a.m. to 3 a.m. on 6/6/2003 on account of the assault they had received from the dacoits. In addition, as noted earlier, the medical certificate at Exhibit 83 issued by PW 9 Dr.Gadakh sated that Savita was raped before she died.

8. Mr.Mundargi, the learned Senior Counsel for the accused submitted that the accused have been implicated by way of mistaken identity and PW 13 Ramesh Sonawane who recorded the dying declaration (Exh.122) of PW 8 had admitted that it was recorded by him and in the same it is clearly stated that PW 8 had identified the four accused from File No.80 and their names were p.284 (1) Gautam Hirama Kale, age 22 resident of Zopwadi Dhiv, Taluka Nevasa, Dist. Ahmednagar, (2) Babakhan Shivaji @ Shvlya Bhosle,

aged 19 years, resident of Gadhavladan, Muktapur Shivar, Tal. Nevasa, Dist. Ahmednagar (3) Khandya Ramu Chavan, aged about 20 years, resident of Bhedlashivar, Tal. Gangapur, Dist. Aurangabad and (4) Suresh @ Navlya Sitaram Kale, aged about 35 years, resident of Kasarwada Karkhana Shivar, Taluka and Dist. Beed. In the said statement the PW 8 had further declared that all these accused identified by her from their photographs had entered her house on the fateful day and assaulted the husband and wife and the children and had also committed dacoity. The prosecution failed to explain as to how the present accused were implicated when PW 8, who is claimed to be a star eye witness had already identified four other persons as the accused and it was never the case of the prosecution that in all 7+4 = 11 dacoits had entered the house of the complainant and committed the offences. As per Shri Mundargi the police backtracked in the course of investigation and more particularly the document recorded as the D.D. at Exhibit 122 and which has been proved in the evidence of PW 13. He also referred to the additional depositions by way of cross-examination of PW 8 as well as PW 13 consequent to the order passed by this Court in Criminal Application Nos.1 and 2 of

2006. In the said additional evidence PW 13 reiterated the fact that he had received the requisition for recording the dying declaration of PW 8 after she had regained consciousness on 7/6/2003 and she had identified the four accused from the photographs shown to her in File No.80 out of the three files handed over to him by the police i.e. File Nos.70, 76 and 80. Whereas PW 8 in her cross-examination in the second round admitted that File No.80 was shown to her by PW 13 when her statement was recorded at Exhibit 122 and she could identify the accused from their photographs but she was not aware of their names. It is urged by the defence that the evidence is clear to the extent that File No.80 containing photographs of history sheeters was shown to PW 8 by PW 13 as per the authorisation he had received from the I.O. and four photographs from the said file were identified by the said witness as the persons who had entered her house in the night of 5/6/2003, assaulted the inmates and committed dacoity. The learned counsel also raised a grievance against the order passed by the learned Judge of the trial Court in declining to exhibit the requisition dated 7/6/2003 received by PW 13 from the I.O. though the original document was already placed

before the trial Court even during the original trial proceedings and when in the additional cross-examination PW 13 clearly admitted to have received the said document and identified it.

. The defence has also strenuously criticised both the TI parades held on 25/7/2003 and 9/10/2004. It was submitted that the TI parade held on 25/7/2003 was in utter breach of the guidelines as contained in the Criminal Manual framed by this Court. When the TI parade was being conducted of accused nos.1 to 5 on 25/7/2003 in the jail premises by PW 25 - Mr.Alhate, the police as well as jail personnel were present in the parade hall, the witnesses were made to sit in such a way that they could see the accused persons while being brought from the jail to the hall, the selection of respectable persons was not done by the Magistrate and on the contrary it was done by the police, the Magistrate did not take any steps to examine that the persons so selected were respectable and reliable as witnesses, the dummies numbering six for each of the accused were also not selected by the Magistrate and instead the police selected them as per their choice. While selecting the dummies it was necessary to ensure that they had

similar features like age, height, complexion and general appearance. It is further alleged that when the witnesses i.e. PW 1 and PW 8 were called one after another, they were told by the police personnel present about the identity of the accused and, therefore, the parade was vitiated. In addition, the respectable persons had also disclosed the identity of each of the accused to the witnesses as and when they were brought in the hall from the adjacent room. Thus the identity of the accused based on this TI parade which was utterly faulty, has to be discarded and in any case the said TI parade was not proved by examining PW 25 Mr.Alhate in the original trial and if that be so, there was no basis for the prosecution to file the charge-sheet against them.

. The deceased Trambak was sitting with his family members in a hut located in Survey No.15/3 and though in his house there was a TV set and music system, this obscure place located in the surroundings of a guava orchard could not be believed to be the target for dacoits. The dacoits in normal course would target a rich man's house or a place where they had sufficient information to believe that the place had sufficient wealth for grabbing. It was

unbelievable that any dacoits would target a hut like that of Trambak to commit dacoity or any other offence like murder, rape or attempt to rape etc. The testimonies of PW 1 and PW 8 are attended by serious infirmities and are fraught with inconsistencies, improvements, omissions and contradictions thereby rendering the said depositions unreliable, fragile and feeble to base a conviction leading to life imprisonment or death which is a capital punishment. As per the defence the testimony of PW 1 is inconsistent, contradictory and untrustworthy and, therefore, unreliable. The said witness had stated before the police that when the accused had entered the hut they started assaulting the inmates and increased the volume of the tape-recorder and switched off the lights. This omission was brought about during the cross-examination of PW 1. PW 1 had stated that he lost his consciousness after the accused had entered and started assaulting the inmates including himself. This would mean that PW 1 had not seen the accused, the accused had switched off the lights during the incident and after having lost consciousness PW 1 could not have witnessed or seen any of the accused. In short it is contended that the evidence of PW 1

Manoj did not inspire confidence and, therefore, ought to be discarded per se.

. The learned Senior Counsel for the defence further submitted that PW 8 Vimalabai subjected her depositions to the criticism of improvements and omissions. The depositions before the Court were in variance with the statement recorded by the police. At one place she has stated that she was taken out of the hut after Savita was taken out whereas at the other place she stated that she was dragged out before Savita. In the document recorded as the dying declaration (Exhibit 122) she did not state that she was raped by any of the accused but in her statement recorded at Exhibit 189 she claimed that she was raped by all after she was dragged out of the hut and taken towards the well and was brought back in the naked condition to the hut. The inconsistencies and contradictions in the said statement are writ large and, therefore, Vimalabai PW 8 is a totally unreliable witness of the prosecution, urged the learned Senior Counsel for the accused.

. He further contended that the evidence of PW 9 Dr.Gadakh indicated that the deceased Trambak and

Sandeep had consumed alcohol but PW 1 Manoj in his cross-examination when suggested, has flatly denied the same. This behaviour of PW 1 Manoj also makes him unreliable and untruthful witness. It is also submitted that no weapons were recovered at the instance of the accused and whatever weapons were produced before the trial Court they were seized from the spot of the incident i.e. the hut of Trambak and brought before the trial Court. To conclude it is submitted by Mr.Mundargi that the prosecution failed to bring anything on record to connect the accused to the crime. The accused were for the first time identified before the trial Court and the purported test identification parade held on 25/7/2003 was not proved before the trial Court and, therefore, an adverse inference is required to be drawn so far as accused nos.1 to 5 are concerned. The silver chain which was discovered at the instance of accused no.5 could not be established to be the belonging of PW 1 Manoj. The learned Addl. Sessions Judge failed to appreciate that the defence had succeeded in demonstrating the glaring inconsistencies in the evidence that was adduced and the testimonies of the prosecution witnesses were hit by material contradictions, improvements, alterations and

variances. However, the learned Judge erred in appreciating the evidence so as to discard the same. The prosecution failed to prove beyond reasonable doubt the complicity of the accused or any one of them in the incident which resulted in the dastardly massacre of five persons from one family and without any provocation from the victims, claimed the learned Senior Counsel for the defence.

9. Mrs. Kejriwal, the learned APP on the other hand has supported the reasoning set out in support of the order of conviction and submitted that the said order does not suffer from any infirmities. As per her the order of conviction is based on the evidence that was adduced by the prosecution and it was impeccable. The testimony of the two eye witnesses PW 1 Manoj and PW 8 Vimalabai could not be weakened on any ground and the identification of the individual accused made by these witnesses before the trial Court was a substantive evidence and even if the test identification parade held on 25/7/2003 suffered from some minor procedural requirements, the TI parade was in fact held and it did not suffer from any major defects. She referred to the depositions of PW 25 Alhate in the additional evidence recorded

and submitted that T.I. Parade reports (Exh.224 to 228) could not be said to be vitiated on any grounds. PW 1 Manoj and PW 8 Vimalabai were consistent in their depositions and the improvements, variations and contradictions, if any, were insignificant and would not in any way make their testimony on the material aspects of the offences vulnerable or doubtful. Both of them were natural witnesses, injured in the assault, had become unconscious and PW 8 Vimalabai had seen the accused and observed them at least for one and half hours and, therefore, her identification of the accused either in the TI parade or before the Court could not be doubted. PW 1 Manoj did not fall unconscious immediately and he was one of the persons whose hands and legs were not tied by the accused. He was not unconscious when an amount of Rs.3000/- was made over by deceased Trambak to the accused under threats, ornaments from the person of Vimalabai and Savita were taken out and also when silver chain and wrist watch was robbed from his person. The assault as per the prosecution started on the members of the family only in the second round after some of the accused consumed liquor sitting outside the hut and when they found that a meagre amount of Rs.3000/- was not sufficient and for more

amount or jewellery to be recovered it was necessary to inflict a physical assault on the members of the family so as to create a scare and terror making them put before them all the jewellery and money. It was, therefore, claimed by the learned APP that PW 1 Manoj also had sufficient time to identify the accused and he identified all the five accused in the TI parade held on 25/7/2003. On the charge of rape it was submitted by the learned APP that the evidence of the prosecutrix viz. PW 8 Vimalabai could not be discarded and she had seen the three accused dragging her daughter Savita out of the hut and taking her towards the guava orchard. Subsequently she was also dragged out of the hut, taken to the well initially and raped there and subsequently taken to the guava orchard where Savita was taken. During all this process PW 8 had sufficient opportunity to see and observe the accused who were involved in dragging out Savita as well as herself. She has also pointed out the medical evidence which went to show that Savita had suffered injuries on her genital and her hymen was ruptured thereby clearly indicating that she was subjected to gang rape before she was injured by inflicting assaults on her head. It was further pointed out that the surviving members of the family

viz. PW 1 and PW 8 had suffered serious injuries and but for the medical treatment, PW 8 perhaps would not have survived.

10. To begin with we shall consider the TI parade held on 25/7/2003 for the identification of accused nos.1 to 5. It is clear from the record that there were in all six dummies for every accused and these six persons were different every time each accused was made to stand in a queue in the parade hall. We have perused the guide-lines as relied upon by the defence for holding the TI parade. PW 25 Mr.Alhate who was the Magistrate and conducted the TI parade clearly stated that he found the dummies to be acceptable and respectable persons selected by the police were assessed by him and found to be reliable. In his explanation report at Exhibit 229 he has clearly stated that no police personnel or any of the employee of the jail was allowed to stand in the parade hall when each of the witnesses was brought for identification of the accused, the accused were asked to change their clothes every time and the accused could not be seen by any of the witnesses prior to such witnesses being called for identifying the accused. In the cross-examination of PW 25 the

defence failed to bring any material defects so as to vitiate the TI parade held on 25/7/2003 or in any way make it doubtful. Merely saying that in the report submitted by PW 25 the height and age of every person used as dummy was not mentioned and, therefore, the Magistrate failed to conduct the parade as required, cannot vitiate the TI parade. Even otherwise we have noted that PW 8 could not identify accused no.2 - Rajya Appa Shinde as is clear from the depositions of PW 25 and she identified the remaining four accused persons whereas PW 1 Manoj identified all the five accused. This is an additional factor in support of the TI parade being genuine and not a casual exercise undertaken by PW 25.

. In this regard we rely upon the following observations made by the Supreme Court in the case of State of Maharashtra Vs. Suresh **[(2000) 1 SCC 471]**:

> "If potholes were to be ferreted out from the proceedings of the magistrate holding such parades possibly no Test Identification Parade can escape from one or two lapses. If a scrutiny is made from that angle alone and the result of the parade is treated as vitiated

every Test Identification Parade would become unusable. We remind ourselves that identification parades are not primarily meant for the Court. They are meant for investigation purposes. The object of conducting test identification parade is two fold. First is to enable the witnesses to satisfy themselves that the prisoner whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence...."

11. Let us go to the criticism of the defence that in the dying declaration of PW 8 Vimalabai so recorded at Exhibit 122 by PW 13 Sonawane, she had identified the four accused from File No.80 shown to her by the said Magistrate on 7/6/2003 while she was under treatment in the hospital and the prosecution had suppressed this material evidence. We have seen the requisition dated 7/6/2003 received by PW 13 and from its original available in the Court which was not exhibited by the trial Court inspite of specific

application having been filed by the defence, it is clear that the said requisition was not for recording the dying declaration of PW 8. It was only a request made to PW 13 after the I.O. had come to know that PW 8 had regained her consciousness after 9.30 p.m. on 6/6/2003 and she was alleging to have been raped, to show her the photographs from the file and find out whether she was able to identify any of the dacoits from those photographs. Thus it was only an exercise in the course of investigation to identify the dacoits by PW 8 Vimalabai. Exhibit 122 in any case cannot be called as a dying declaration when Vimalabai survived and it could be at the most termed as her previous statement during the course of investigation. It cannot be treated to be substantive evidence and at the most it could be used for the limited purpose of corroboration or contradiction of the testimony of its maker and in any case it cannot be admissible under Section 6 or Section 32 of the Evidence Act. In this regard we may safely rely upon the decision in the case of Gentela Vijayvardhan Rao & anr. v. State of A.P. **(AIR 1996 SC 2791)**. Just because Exhibit 122 was recorded by the Magistrate it could not be termed as a dying declaration and it will have some utility in

trials in asmuchas it could be used to corroborate the testimony of the maker in Court under Section 157 of the Evidence Act.

12. PW 1 Manoj and PW 8 Vimalabai are the two eye witnesses to the incident. The defence does not dispute the occurrance of the incident and it could not. What is claimed by the accused is that they are not involved in the said incident and they were falsely implicated by the police. As per the accused these two witnesses made contradictory statements and the improvements, omissions and contradictions etc. arising from their statements recorded by the police and their depositions before the Court made their testimony most unreliable. We have to, therefore, at the first instance, test the veracity or reliability of the evidence of PW 1 and PW 8. The well recognised doctrine of falsus in uno falsus in omnibus, being not applicable to our criminal jurisprudence, one statement or few statements found here and there to be false cannot be a reason to discard the entire evidence of any witness. The falsehood can be excluded from the testimony and the remainder has to be examined and if found to be reliable it can be relied in support of the

prosecution case. The trial Court in the instant case has tested the evidence of both these witnesses and rightly held that they were natural and reliable witnesses. They were injured in the assault to the extent that they had become unconscious and their statements recorded by the police have to be considered even for contradictions, omissions or improvements by appreciating the mental conditions of these witnesses at the relevant time. When they were brought to the hospital PW 1 had regained consciousness around 7.30 a.m. whereas PW 8 regained her consciousness around 9.30 p.m. on 6/6/2003. The statement of PW 8 recorded by PW 13 on showing photographs from File No.80 cannot be considered as substantive evidence as noted earlier and in any case in her additional cross-examination before the trial Court she stated that the names of the persons identified could not be known to her and what was shown to her were merely the photographs. The case diary maintained by the concerned police station was placed before us and it has also come in the evidence before the trial Court that during the investigation statement of Sunita, wife of accused No.2 was also recorded (Exh.77A). The inquest panchanamas (Exh.25 and 26) showed that hands and legs of Trambak and

Sandeep were tied. This was so stated by PW 8 Vimalabai in her depositions before the trial Court. She gave in her depositions the details of the assault on each of the deceased as well as on herself and PW 1 Manoj. The medical certificates issued by the doctors concerned do show that by and large the assaults so described tally with the doctor's certificate. She had stated that Savita was brought back to the hut in naked condition and she had seen bleeding on her private parts. PW 6 and PW 12 have clearly stated that between 7.00 and 7.30 a.m. on 6/6/2003 they had seen Savita's body in naked condition in the hut. The post mortem report at Exhibit 81 clearly indicated that Savita was bleeding and her hymen was ruptured. In the case of Ravinder Kumar & anr. vs. State of Punjab **[(2001) AIR SCW 3366]** the following observations made in relation to the mental state of an injured woman witness have been succinctly stated in the following words:

> "... The initial tension and suspense, undergone by her would have billowed up into a massive wave of grief. It is only understandable how much time a woman, placed in such a situation, would take to reach some

level of placidity for communicating to the strangers of what she knew about the last journey of her husband..."

13. In a case like this it is well established that the testimony before the Court is the substantive evidence and the TI parade cannot be a substantive evidence. In the case of Amitsingh Bhikamsing Thakur v. State of Maharashtra **[JT 2007 (1) SC 390]** the Supreme Court observed in this regard as under :

"It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak

character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code which obliges the investigating agency to hold or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code. Failure to hold a test identification parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such

identification should be a matter for the Courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration."

The second TI parade was held on 9/10/2004 for accused no.6 and though we find some merit in the challenge to its reliability, we must note that the same accused came to be identified by PW 1 - Manoj and PW 8 - Vimalabai, during the trial before the Court.

14. We will proceed to examine the evidence of these two witnesses in support of the prosecution case of dacoity, murder, rape and attempt to cause murder etc.

. PW 1 Manoj in his depositions before the trial Court stated that he was staying with his parents, one sister and brothers in a hut prepared of gunny bags located in the land bearing Survey No.15/3 belonging to Shri Raghunath Hagwane (PW 6). The incident occurred on 5/6/2003 and it was at about 10.30 p.m. when all the members of the family along with one guest Bharat Ashok More were present in the

house and were chitchatting after the dinner, suddenly 7 to 8 persons entered in the hut and they were of the age between 25 to 30 years. They were wearing underpants and banyans, electric light was on in the hut at that time and they had increased the sound of the tape and TV in the hut. They threatened his father to take out the money by saying "paise kidhar rakha hai, nikalo". His father under the fear handed over an amount of Rs.3000/- which was in his pocket. They had snatched a silver chain and wrist watch from his person. They also handed mangalsutra and ear tops of his mother and anklets from his sister. They started assaulting the members of the family and he was assaulted with a gupti and yokpin on his lips, forehead and right side of the chest. They also asked his mother as to where the money was kept. Accused no.3 Ambadas had assaulted him with knife and accused no.1 Ankush had given him the blow on the rear side of his head. Accused no.1 Ankush had switched on the tape-recorder and his father Trambak had handed over the amount of Rs.3000/- to accused no.3 Ambadas. After some time he fell unconscious and the accused had not put off the lights before he lost his consciousness. The accused had started scuffle with the members of the family as

soon as they had entered the house. On 25/7/2003 police had taken him and his mother to the Central jail for the TI parade and he emphasized that he had identified all the accused nos.1 to 5 and the said accused identified on 25/7/2003 were the same persons standing as accused nos. 1 to 5 in the Court. He and his mother were under the medical treatment for about 2 and 1/2 to 3 months. On 22/8/2003 police had called him to identify the chain in the premises of the Collector's office at Nashik and he had identified the same. He further stated that accused no.6 was identified by him in the second identification parade held on 9/10/2004 in the Central Jail. He stated before the Court that the said accused no.6 whom he had identified in the identification parade was present before the Court and pointed to accused no.6. Muddemal article no.33 was his pant and muddemal article no.54 was his shirt whereas article no.8 belonged to his sister and article no.39 was the underpant of his father, article no.42 was a pant of his brother and article no.57 is the chain which was snatched from him in the night of 5/6/2003 and identified by him in the Collector's office at Nashik. He was specific in his statement that accused no.3 had assaulted him with

knife, whereas the accused no.1 had given him a blow by yokpin behind his head. He further stated that all the other acused assaulted the family members with wooden sticks. In his cross-examination, he admitted that on the next day of the incident there was a marriage of the son of Raghunath Hagawane, PW 6 and he denied the suggestion that all members of his family had gone to the house of the landlord for marriage preparations on the earlier day or on the day of the incident. He denied that there was no electric meter in the hut and the landlord was not paying separate electricity bill for the lights in the hut. He also admitted that during the course of the incident one of the robbers had asked his father whether he had identified him and he told him that he was from Bombay (mereko pahechana kya, main Bambaise aaya hun). He denied the suggestion that from the room they were made to sit in the jail, he and his mother could see the persons inside the jail when he was taken in the identification hall each time, there were seven persons standing in one line. He denied the suggestion that the police had shown them the photographs of the accused. He also denied the suggestion that the accused were shown to them before the identification parade. All the seven persons

standing in one queue in the identification hall were wearing pant and shirt. He also stated that it was not true to say that the police had already shown the accused to them and had asked to identify them as the accused persons. He also denied the suggestion that the persons who had entered his hut were the persons of his father's acquaintances from Jalgaon and that they were residing at Mumbai. He also denied the suggestion that the incident had occurred due to inter se disputes. He admitted that he was unable to state the day and the date when he was called for the second TI parade. He denied the suggestion that he was residing separately from his parents.

15. PW 8 Vimalabai in her examination-in-chief stated that the incident had occurred on 5th of Jeshth month and it was Thursday. Her sister's son Bharat More was also staying with her as a guest on the date of the incident and son Manoj had gone to the village for Satyanarayan pooja but returned home by about 9.30 p.m. It was around 10.30 p.m. that seven unknown persons entered her hut and after seeing them her children got frightened. These unknown persons asked her husband where he had hidden the property (maal kahan chhupa kar rakha hain). Her

husband took out Rs.3000/- and passed it on to the accused. They had removed her mangalsutra, dorley and eartops as well as anklets and eartops of her daughter Savita. Silver chain of Manoj and wrist watch was also snatched. Accused had tied the hands and legs of all except Manoj and Savita. They picked up water containing vessel and drank liquor sitting in front of the hut. They were coming and going out of the hut one by one and the vessel of water was kept at a distance of 10 ft. from the hut. After they drank liquor the accused entered the hut with arms like gupti, knife, wooden handle of axe and two were having sticks, whereas two others were holding torches. They were all talking in Hindi and saying that unless they (victims) were subjected to assault they would not part with money and valuables and, therefore, they started assaulting her husband. He was assaulted on his left shoulder near neck with the stick and at this point her second son Sandeep told them to take whatever they wanted but they should not assault any member of the family. One of the accused gave a blow of stick on the right shoulder of Sandeep from behind and as a result he fell down. The other accused gave a blow of gupti in the stomach of Sandeep, third one gave a blow of gupti to the right

side waist of Manoj. She requested them not to assault the family members and at that stage one of the accused gave a blow of gupti at the right side of her stomach and a blow of knife near her ear. When she was called for identification parade she had identified the four accused and stated that the person who had removed the anklets and eartops was accused no.3 - Ambadas by pointing out towards him in the Court. She pointed out to accused no.6 as the person who had removed her mangalsutra and raped her, near the well. She pointed to accused no.1, accused no.2 and accused no.4 as the three persons who had dragged Savita out of the hut and after some time brought her back in naked condition with injuries on her private parts and she was unconscious or dead. She pointed to accused no.3 and stated that he had given a blow of gupti near her ear. She pointed to accused no.5 and stated that he was the person who killed her husband. She further stated that she was conscious upto 12 O'clock in the night and she could watch them all in the hut and during all this time tape-recorder was on. In the Court she identified the clothes which were on her person on the date of the incident and the weapons used by the accused in the said incident. Muddemal article no.5 were the

clothes of her husband, muddemal article no.8 were the clothes of Savita, muddemal article no.3 were the clothes of Sandeep, muddemal article no.6 were the clothes of Manoj, muddemal article no.39 were the clothes of her husband whereas muddemal article no.9 was the Odhani of Savita and shirt of Shrikant. Muddemmal article nos.72 and 40 were the ornaments of Savita, muddemal article no.76 to 79 were the weapons used by those persons. We have seen the weapons from the muddemal articles received from the trial Court. One is a wooden handle of axe, the second one is a spade with wooden handle, third one is yokpin and the fourth one is a sickle. As far as the assault on her was concerned, she specifically stated that it was inside the hut. The defence in her cross-examination had attempted to bring about some improvements over the statement she made to the police and in our opinion these are very inconsequential to the main testimony about the incident and the acts attributed to each of the accused as stated hereinabove and, therefore, these improvements or variations would not in any way weaken her main testimony. The medical injuries she stated to have been caused to all the family members, as noted earlier, almost tally with the medical certificates issued by the Medical

officer concerned. About the test identification parade she emphatically stated that in both the parades she was present and in the first parade she had identified the four accused persons whereas in the second parade she had identified only one accused person and all the accused persons she identified before the Court as well by pointing her finger towards them. The depositions of this witness clearly go to show that the incident had taken place in different stages. In the first part seven to eight unknown persons entered the hut with under clothes on their bodies and started threatening them and demanded money. Under the fear of assault her husband, to begin with, gave Rs.3000/- to one of the accused. The valuables like mangalsutra, eartops, dorley and anklets etc. were removed from the persons of Vimalabai as well as Savita by the accused and thereafter they started consuming liquor sitting outside the hut for which they used to enter the hut and take water after every five minutes. Before they started consuming liquor they had also tied the hands and legs of all the family members except Manoj and Savita. In the second part after drinking liquor the accused entered the hut with arms in their hands and with a belief that unless the family members were

subjected to assaults, more money and valuables could not be recovered. The first assault was on Trambak, the second was on Sandeep, third one was on Manoj and thereafter Bhurya @ Shrikant as well as Bharat were smashed. Vimalabai also was assaulted and thereafter accused nos.1, 2 and 4 dragged Savita out of the hut and took her to the guava orchard. Thereafter Vimalabai herself was dragged out of the hut by two accused but the name of the second accused she could not give. She stated that one of the accused had raped her and he was the same person who had removed her mangalsutra while in the hut. She pointed to accused no.6 as the same person. In her additional cross-examination recorded during the pendency of this Confirmation case as well as the appeal, she stated regarding the photographs of the accused shown to her from file no.80 that four of the dacoits she could identify from the photographs but was not aware of their names. Much has been said by the defence on this part of Vimalabai's evidence in support of the contention of the accused that they were implicated in the case under a mistaken belief and the real accused who were identified by Vimalabai on the basis of photograph shown to her by PW 13 went scot free and the accused were falsely implicated by the police

to save their skin. We are not impressed by these submissions which were also advanced before the trial Court. It is not only the TI parade where the accused were identified by both these witnesses but in fact during the course of the trial the witnesses while in the witness box pointed their fingers towards each of the accused assigning a specific role to every one of them in the course of the incident. The learned Judge of the trial Court was, therefore right in holding that both these witnesses were natural and their testimony was found to be reliable, cogent and free from any doubts. In the evidence of PW 1 Manoj it has been brought out that the silver chain recovered from the house of accused no.5 as was brought out in the evidence of PW 21 Patil and the panch witness PW 14 Sayyed was his chain and it is another incident proving the involvement of the accused. The silver chain was recovered at the instance of accused no.5 and from his house and PW 1 Manoj was taken to the Collector office at Nashik to identify the same which he did and he reiterated the identity of the said chain article no.57 in the Court as well when it was shown to him. The incident had lasted for a sufficiently long time and, therefore PW 8 Vimalabai had sufficient time to watch every

accused who were unknown to her. PW 1 Manoj had also seen the accused till he fell unconscious in the second stage of the incident. The facial impressions of the accused could not be erased from the minds of PW 1 and PW 8 till they could identify the accused in the identification parade and subsequently during the trial before the trial Court. It cannot be laid down as a principle of law that in every case after a lapse of some period the witnesses would not be in a position to identify a person seen by them for the first time in the incident. When the incident lasts for a longer period the witnesses are provided with a fair opportunity of seeing the accused, noting their features, appearances etc. including their manner of talking, the utterances made by each one of them and the specific offences committed by such accused. The incident was so dastardly and heinous that it could create an indelible impression on the minds of these witnesses and, therefore, it cannot be accepted that the memories of the accused persons would get washed off.

16. The injuries noted and certified by the Medical Officer PW 9 on the bodies of the deceased persons and which resulted in their death are seen to

be mostly the injuries with internal bleeding and the death had occurred between 1 to 3 a.m. on 6/6/2003 whereas the injuries caused were between 11 to 12 in the night of 5/6/2003. The victims became unconscious and then died after few hours in the absence of any medical treatment. Vimalabai was also very specific in her depositions that the accused put on shoes and started walking on the bodies of these victims. Some of these shoes have been recovered and recoveries have been duly proved. The injuries noted by Dr.Gadakh - PW 9 and Dr.Nalini Shardul - PW 15 on the person of all the victims by and large tally to the description that came out through the testimony of these two witnesses and, therefore, the trial Court was right in accepting the testimony of these two witnesses regarding the role of each of the accused in the incident. The evidence of these two witnesses does not suffer from exaggerations or falsehood. During the course of their medical treatment they could realign the events that had taken place during the dastardly incident in which they were lucky enough to survive.

17. On the offence of rape apart from the testimony of PW 8 Vimalabai, the other evidence is

through the Medical Officer PW 9 Dr.Gadakh and PW 15 Dr. Shardul. Vimalabai was in her late forties at the relevant time and mother of four grown up children. The chemical analysis report as well as the medical evidence of Dr. Shardul does not emphatically prove that Vimalabai was raped near the well after she was dragged out of the hut, though in her depositions before the Court as well as the statement made by her during the course of investigation and placed at Exh.189 she stated that she was raped by accused no.6. This incident of rape on Vimalabai is not free from serious doubts though it is well established that when a prosecutrix states on oath before the trial Court that she was raped, the medical evidence on that issue becomes inconsequential unless contrary and it is not necessary that in every case of rape, injury or presence of semen is required to be proved as penetration can occur without discharge and without causing injury, particularly in the case of women habituated to intercourse. But having regards to the obtaining circumstances surrounding the incident i.e. her statement that she was brought to the hut after she was raped and she was conscious till 12 in the night and thereafter she became unconscious while the

accused were still present in the hut and she regained her consciousness at 9.30 p.m. on 6/6/2003, that the CA report does not indicate the presence of semen in the vaginal swab sent for chemical analysis and even her clothes which were sent for chemical analysis did not show presence of semen. In addition, in her statement at Exhibit 122 recorded by PW 13 she did not state anything about the alleged rape on her by any of the accused though the said statement cannot be termed as a dying declaration or any piece of substantial evidence for that matter. Dr. Shardul PW 15 had examined Vimalabai at 8.20 a.m. on 6/6/2003 and issued the medical certificate at Exhibit 130. She was again subjected to a medical examination at 9.30 p.m. on 6/6/2003 by PW 15, on the reported allegation of rape and the medical certificate at Exhibit 131 was issued. It is not the case of PW 15 that Vimalabai was raped in the incident and the CA report does not support the prosectuion that Vimalabai was raped. It would be therefore unsafe to accept the findings of the trial Court that PW 8 Vimalabai was raped or subjeted to sexual assault during the incident. She is a rustic village woman. No effort was made by the prosecution to bring out from her evidence while in the witness

box, that accused no.1 had a forced sexual intercourse with her near the well. It was necessary for the prosecution, to prove its case beyond any reasonable doubt. It is possible that Vimalabai did not understand the subtle difference between rape and molestation, in the facts of this case.

. However PW 9 Dr.Gadakh in the post-mortem report (Exh.81) clearly stated in para 15 that Savita had suffered bleeding injury on her private part and her hymen was ruptured. She was found to be of the age of 15 years and Vimalabai stated that she was dragged out of hut by three accused and was brought back naked and dead by the very same accused and thrown in the hut. It was the contention of the defence by referring to the inquest panchanama at Exhibit 27 that the lady panchas who had examined the dead body of Savita had not noticed any bleeding around Savita's private part and, therefore, it could not be believed that Savita was raped before she was assaulted and killed. The statement of the lady panchas while drawing the inquest panchanama cannot be a substitute for the medical opinion of PW 9 Dr. Gadakh. It is possible that when this young girl was tried to be raped, she resisted and in fact fought to

save her dignity. The accused who were trying to attempt to rape would in normal course received injuries as a result of the fight-back of the victim. PW 16 Dr.Satish Shimpi had examined accused nos.3, 4 and 5 whereas accused nos.1 and 2 were examined by PW 24 Dr.Vilas Patil. As per PW 16 he did not find any injuries on the person of accused no.3 and accused no.5, whereas on the person of accused no.4 he noted the injuries like healed scar mark over centre of neck - 2 cm below Adam's apple, healed scar mark over lower lateral part of left side of neck and healed scar mark over back near right scapula. As per him the age of these injuries was within three weeks from 27/6/2003 when he had examined the accused whereas PW 24 Dr.Patil stated before the Court that during their medical examination on 26/3/2003 he found on the person of the accused no.2 the injuries like healed abrasions over right cheek, healed scar over right side of neck, linear scar over right scapula and healed abrasion over lumber spine. Similarly on the person of accused no.1 he found healed multiple abrasions over right lumber region and healed scar over right arm. Medical certificates at Exhibits 195 and 196 were issued by him certifying these injuries which were within three weeks from the date of the

medical examination He had also given an opinion before the Court that such type of injuries were possible if a person tried to resist another person. It was further stated by PW 16 Dr.Shimpi that the injuries found on the person of accused no.4 were possible during an agricultural work. The argument advanced that the injuries seen on the person of accused no.4 or accused nos.1 and 2 could not be related or connected with the alleged rape on the daughter of PW 8 have been rightly rejected by the trial Court. At the first instance the accused failed to give any explanation in their statements recorded under Section 313 of Cr.P.C. regarding these injuries. In addition the medical opinion that these injuries can be caused to a person who suffered resistance from the victim cannot be discarded. As noted earlier it was a specific case of Vimalabai that accused nos.1, 2 and 4 had dragged Savita out of the hut, taken her towards the guava garden, raped her and assaulted her and after killing her she was dropped back in the hut without any clothes on her person. In this regard we may usefully refer to the decision in the case of **State of U. P. vs. Babul Nath [(1994) 6 SCC 29]**. In that case the medical officer deposed that on external examination of the

victim girl, she had found that the hymen was completely torn and there was laceration on all sides of vagina. The doctor had further noticed fresh bleeding in the private part of the victim and on internal examination the doctor found that a finger could easily be inserted in her private part and blood stained discharge was coming out. The Supreme Court noted that from the medical evidence it was clear that the girl was not only subjected to an indecent assault but there was sexual activity and the girl was subjected to sexual acts otherwise the doctor would not have found the hymen completely torn, laceration on all sides of vagina and fresh bleeding. The Court referred to the "Medical Jurisprudence" by Modi in which it has been stated that in a girl under 14 years of age the vaginal orifice is usually so small that it will hardly allow the passage of the little finger through her hymen. This is an additional circumstance in the instant case considering the evidence of PW 9 Dr.Gadakh that deceased Savita was subjected to sexual assault by the accused nos.1, 2 and 4. It is not necessary as to who out of these three accused persons either attempted or raped the deceased. The trial Court referred to Explanation 1 to Section 376 of IPC which

states that where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section (2) of Section 376. Similarly explanation below Sixthly of Section 375 states that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. The absence of semen in the vaginal swab of Savita as per the CA report would not in any way weaken the medical evidence that she was subjected to a sexual assault by the accused during the incident and before she was injured and dead. The nail clippings of Savita sent to the chemical analysis have shown the presence of human blood. The injuries externally noted on her chest, shoulders and on her back also add to the prosecution case that she was subjected to sexual assault by the accused and it is possible that when the accused realised that she would not fall a victim to their hunger of flesh and the empowerment exercised by all of them, one or more of them got furious and gave multiple blows on and around her skull.

18. Now coming to the injuries caused to PW 1

Manoj and PW 8 Vimalabai during the incident, it needs to be noted that Manoj regained his consciousness around 7.30 a.m. whereas PW 8 Vimalabai regained consciousness at about 9.30 p.m. on 6/6/2003. It could be safely believed that but for the medical treatment made available to her, the injuries caused to PW 8 could be fatal. Both of them had suffered grievous injuries and were under medical treatment for 1 1/2 to 2 months. They had suffered several injuries and they were brutal and caused by blunt and hard object. They survived because the accused perhaps felt that all the victims were dead. However just because these two witnesses survived, it could not be said that the accused had no intention to cause their death while they inflicted multiple assault on them with wooden handles or the yokpin. It was just a chance and perhaps their luck that they survived. The trial Court, therefore, held the accused guilty and in our opinion rightly, of the offence punishable under Section 307 of IPC so far as the assault on these witnesses are concerned.

19. To conclude we hold that the accused had committed dacoity and in that process conjointly they had committed the murder of five victims viz.

Trambak, Sandeep, Shrikant @ Bhurya, Savita and Bharat and all these victims died a homicidal death. The case of the prosecution was, therefore, proved beyond doubt for the offences punishable under Sections 395, 396, 397 and 302 of IPC read with Section 34 of IPC. The prosecution also proved its case beyond reasonable doubts for the offence punishable under Section 307 read with Section 34 of IPC. We also agree with the prosecution that Savita was gangraped and we hold that it was the act of accused nos.1, 2 and 4 before she was done to death during the incident. However, in our considered opinion the case of the prosecution that PW 8 Vimalabai was raped by accused no.6 is not established beyond reasonable doubt. We also hold that the charge under Section 398 of IPC was duly established by the prosecution against the accused.

20. On the issue of sentence we have heard the learned Senior Counsel for the accused and the learned APP exhaustively. It was submitted by the learned Senior Counsel for the accused that on the face of evidence of TI parade and PW 1 and PW 8 as well as no recovery of any weapon having been proved at the instance of any of the accused, this case is

most unfit for imposing the death penalty. The learned Senior Counsel for the accused has relied upon the decision in the case of **Ronny alias Ronald James Alwaris & ors. v. State of Maharashtra [(1998) 3 SCC 625]** and submitted that the sentence of death penalty is most unwarranted because the incident does not fall within the category of "rarest of rare". He pointed out that all the accused including accused nos.1, 2 and 4 are in their twenties or thirties even as at present and it is not possible to predict that they do not show any signs of reformation if given such an opportunity. He submitted that these are the mitigating circumstances to award less sentence and more particularly when there was no evidence proving beyond reasonable doubt regarding the involvements of the accused though it could not be disputed that the incident had taken place and it was dastardly, heinous and had created massive scare and hatred amongst the masses at the relevant time. Though seven innocent persons became the victims and five of them lost their lives in the incident, the accused also have their right to live in this world peacefully and the accused had no grievance or enemity against any of the victims. He laid emphasis on the underlying principle of

sentencing jurisprudence emphasising reformation while awarding the extreme or capital punishment. The learned counsel referred to the reasoning set out by the trial Court in support of the sentence of death and pointed out that it fails to satisfy the well recognised legal parameters underlying the principle of reformation which must be considered before awarding the capital punishment. The learned Senior Counsel referred to the following decisions of the Apex Court and submitted that the case submitted by prosecution under Section 366 of Cr.P.C. for confirmation ought to be turned down:

(1) Virsa Singh v. State of Punjab **[AIR 1958 SC 465]**

(2) Bachan Singh v. State of Punjab **[AIR 1980 SC 898]**

(3) Machhi Singh v. State of Punjab **[AIR 1983 SC 957]**

21. On the other hand the learned APP relied upon the following decisions of the Supreme Court:

(1) Gurdev Singh v. State of Punjab **[(2003) 7 SCC 258]**

(2) State of U.P. vs. Satish **[(2005) 3 SCC 114]**

(3) Adu Ram vs. Mukna **[(2005) 10 SCC 597]**

. In the case of Adu Ram (Supra) their Lordships made the following observations:

> "Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order, and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meagre sentences or taking too sympathetic a view merely on account of lapse of time in respect of such

offences will be resultwise counterproductive in the long run and against societal interest which needs to be cared for and strengthened by a string of deterrence inbuilt in the sentencing system."

22. The learned Judge of the trial court in support of the sentence and penalty she imposed, sets out the following reasons in para 53 of the judgment:-

".....In the present case, the Accused had gone to such an extent that while committing the dacoity they had caused the murders of 5 persons. Out of them 4 were of tender age and one was aged about 50 years. All these deceased person had not resisted to the Accused in any way. Even their ages were such that they probably were not in a position to resist the Accused. Accused also had committed the gang rape on the girl of 15 years of age and also on her mother. Not only this, they had jumped on the bodies of the persons lying in the hut by wearing shoes in

their feet. All these act show that Accused had committed brutal murder and their acts were inhuman. They were indifferent and away from huminity. Moreover, such type of incident do create shock in the collective conscious of the society. In such circumstances though the Accused are between 25 to 30 years of age, but the enormity of the crime and gravity of the situation in which the offence is committed out weights. The consideration of the ages of the offenders. And in such circumstances, I am constrained to hold that this is one of the rarest of the rare case."

. It is well settled in law that in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other

attending circumstances are relevant facts which would enter into the area of consideration. Undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law, and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed, etc. **[Sevaka Perumal v. State of T.N. (1991) 3 SCC 471]**.

. The proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. The practice of punishing all serious crimes with equal severity is now unknown in civilised societies, but such a radical departure from the principle of proportionality has disappeared from the law only in recent times. Even now for a single grave infraction, drastic sentences are imposed. Anything less than a penalty of greatest severity for any serious crime is thought then to be a measure of toleration that is unwarranted and unwise. But in

fact, quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences. **[Shailesh Jasvantbhai v. State of Gujarat (2006) 2 SCC 359].**

. The imposition of appropriate punishment is the manner in which the court responds to the society's cry for justice against the criminal. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment. **[Dhananjoy Chatterjee v. State of W.B. (1994) 2 SCC 220].**

. It is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but

also against the society to which the criminal and the victim belong. If for extremely heinous crime of murder perpetrated in a very brutal manner without any provocation, most deterrent punishment is not given, the case of deterrent punishment will lose its relevance. **[Ravji v. State of Rajasthan (1996) 2 SCC 175].**

. In the case of **Ram Anup Singh v. State of Bihar [2002 SCC (Cri) 1466]**, uncle of the accused had only one daughter who was to inherit her father's property. The appellants virtually annihilated the entire family of the uncle. A three-Judge Bench of the Supreme Court while setting aside the death sentence awarded to all the accused observed thus :

> "There is no evidence on record to suggest that the appellants are a menace to the society as evident by their past deeds. It is not possible to conclude that they are those who cannot be reformed or rehabilitated and that they constitute a continuing threat to the society. In fact, apart from the incident in question, there is not even an allegation about the appellants having indulged in such

behaviour in the past or having resorted to violence and committed any offence whatsoever. They appear to belong to a middle class farmer family for whom land has great value. But even so, there is nothing to suggest that they may repeat such barbarism in future so that they would constitute a continuing threat to the society. Having regard to all the facts and circumstances, and also having regard to the fact that the evidence does not disclose the immediate cause of the incident, we do not find it safe to confirm the sentence of death awarded by the High Court to Lallan Singh and Babban Singh."

. In the case of Baldev Singh (Supra) the incident had occurred on 21/11/1991 and it was held by the learned Sessions Judge that the accused were members of unlawful assembly whose common object was to kill 15 persons and, therefore, while convicting them for the offence punishable under Section 302 read with Section 149 of IPC they were sentenced to death penalty. The Apex Court assessed the aggravating and mitigating circumstances and held that the entire incident was extremely revolting and

it shocked the collective conscience of the community. The acts of murder committed by the appellants were so gruesome, merciless and brutal that the aggravating circumstances far outweighed the mitigating circumstances and, therefore, it was held that the sentence of imprisonment for life was not adequate and consequently the death sentence imposed by the Courts below was confirmed.

. In the case of Ronny alias Ronald James Alwaris (Supra) accused no.1 - Nitin with his two friends i.e. Ronny and Santu, all residents of Mumbai went to the house of his uncle (mother's brother) Mr. Mohan Ohol at Pune and after they were entertained by the family the accused had killed Mohan, his wife and son. Mohan's wife Ruhi was gangraped before she was done to death. These murders were also gruesome, merciless and brutal. The incident had shocked the community around. The Sessions Court had while convicting the accused awarded the death penalty to all of them and the same was confirmed by this Court under Section 368 of Cr.P.C. The aggravating circumstances in that case were recorded by the Apex Court in the following words :

> "Accused no.1 is no other than the nephew (sister's son) of the deceased Mr. Mohan Ohol. Because of the relationship he gained access inside the house for him and for his friends; they enjoyed the hospitality of the Ohol family.... The victims were unarmed; the heinous crime was committed for gain, namely to rob the valuables of the Ohol family, to give effect to their nefarious plans the unholy alliance of the appellants not merely robbed the family of valuables but killed all the three members of the family then in the house and above all committed sexual assault on Mrs. Ruhi Ohol. It cannot but be a dastardly act for A-1 to commit rape of Mrs. Ohol, who is none other than the wife of his maternal uncle and perhaps as old as his mother."

. However, the Apex Court held that it was not a case which would fall within the "rarest of the rare" cases. We may usefully reproduce the following observations in para 47 of the said judgment :

"Considering the cumulative effect of all the factors, it cannot be said that the offences were committed under the influence of extreme mental or emotional disturbance for the whole thing was done in a pre-planned way; having regard to the nature of offences and circumstances in which they were committed, it is not possible for the Court to predict that the appellant would not commit criminal act of violence or would not be a threat to the society. A-1 is 35 years' old, A-2 is 35 years' old and A-3 is 25 (sic 27) years' old. The appellants cannot be said to be too young or too old. The possibility of reform and rehabilitation, however, cannot be ruled out. From the facts and circumstances, it is not possible to predict as to who among the three played which part. It may be that the role of one has been more culpable in degree than that of the others and vice versa. Where in a case like this it is not possible to say as to whose case falls within the "rarest of the rare" cases, it would serve the ends of justice if the capital punishment is commuted into life imprisonment. Accordingly, we

modify the sentence awarded by the courts below under Section 302 read with Section 34 from death to life imprisonment. The sentences for the offences for which the appellants are convicted, except under Section 376(2)(g) IPC, shall run concurrently; they shall serve sentence under Section 376(2)(g) IPC consecutively, after serving sentence for the other offences."

23. In the instant case in addition to the specific assaults attributed to and proved to have been committed by accused no.3 and accused no.5, it has come in the evidence of both the witnesses that all the accused were assaulting the members of the family i.e. Trambak, Sandeep, Shrikant @ Bhurya, and Bharat and, therefore, the trial Court rightly held them all guilty of the offence punishable under Section 302 read with Section 34 of IPC as well as Sections 395, 396 and 397 of IPC. The murder of Savita and her rape is specifically proved to have been committed by accused nos.1, 2 and 4 in view of the evidence of PW 8 read with medical evidence of PW 9 Dr. Gadkah, PW 16 Dr.Shimpi and PW 24 Dr.Patil. One of the mitigating circumstances to be considered

in favour of the accused is their age. Almost all were in their 20s and perhaps one of them is in his 30s. It was also submitted by the learned Senior Counsel for the accused that there was no earlier antecedent which would label them as the habitual criminals or offenders and, therefore, it could not be accepted that they were beyond reformation.

. Five members of the family were brutally murdered, they were all unknown to the accused and there was no animosity towards them. Four of the victims were of tender age. They were defenseless and the attack was without any provocation and even otherwise some of them were so young that they could not have resisted any attack by the accused. A minor girl of 15 years of age was dragged in the open field, gangraped and done to death. The whole incident is extremely revolting, it shocks the collective conscience of the community. The aggravating circumstances far outweigh the mitigating circumstances in the case of accused nos.1, 2 and 4. The accused could be traced because of a fresh offence having been registered against some of them on 19/6/2003 in the police station at Bhokardhan in Jalna district. We are, therefore, satisfied that so

far as accused nos.1, 2 and 4 are concerned, reducing the sentence to imprisonment for life would not meet the ends of justice, whereas in the case of the other three accused, the sentence of death, in our considered opinion, is not called for.

24. For the above reasons, we modify the order of conviction and sentence passed by the learned III Ad-hoc Addl. Sessions Judge, Nashik in Sessions Case No.43 of 2004 and substitute the same by the following order:

(1) Accused no.1 - Ankush Maruti Shinde, accused no.2 - Rajya Appa Shinde and accused no. 4 - Raju Mhasu Shinde are hereby convicted and sentenced to death for the offence punishable under Section 302 read with Section 34 of IPC and are directed to be hanged by their necks till they are dead. The sentence so awarded by the trial Court is hereby confirmed under Section 368 of Cr.P.C.

(2) The accused no.3 - Ambadas Laxman Shinde, accused no.5 - Bapu Appa Shinde and accused no.6 - Surya alias Suresh s/o. Nagu alias Gangaram Shinde are hereby convicted for the offence punishable under

Section 302 read with Section 34 of IPC. However the death sentence awarded to them by the trial Court is set aside and instead they are sentenced to suffer rigorous imprisonment for life and to pay a fine of Rs.1000/- each, in default of payment of fine to suffer further R.I. for three months each. Criminal Appeal No.590 of 2006 is accordingly allowed partly.

(3) The accused no.1- Ankush Maruti Shinde, accused no.2 - Rajya Appa Shinde and accused no.4 - Raju Mhasu Shinde are convicted for the offence punishable under Section 376(2)(g) of IPC and they are sentenced to suffer RI for a period of ten years each with fine of Rs.200/- each, in default of payment of fine, to suffer further R.I. for a period of one month each.

(4) The order of conviction and sentence for the offence punishable under Section 376(2)(g) of IPC as passed by the trial Court against accused no.3 - Ambadas Laxman Shinde, accused no.5 - Bapu Appa Shinde and accused no.6 - Surya alias Suresh s/o Nagu alias Gangaram Shinde is hereby set aside and Criminal Appeal No.590 of 2006 is partly allowed to that extent.

(5) The accused nos.1 to 6 are convicted for the offence punishable under Section 307 read with Section 34 of IPC. They are sentenced to suffer R.I. for five years each and to pay a fine of Rs.200/- each, in default of payment of fine to suffer further R.I. for a period of one month each.

(6) The accused nos.1 to 6 are convicted for the offence punishable under Section 397 read with Section 395 of IPC. They are sentenced to suffer R.I. for a period of seven years each and to pay a fine of Rs.200/- each, in default of payment of fine to suffer further R.I. for one month each.

(7) Accused nos.1 to 6 are convicted for the offence punishable under Section 396 of IPC and they are sentenced to suffer R.I. for ten years each and to pay a fine of Rs.200/- each. In default of payment of fine to suffer further R.I. for one month each.

(8) All the sentences to run concurrently. The accused concerned shall be entitled for set off under Section 428 of Cr.P.C.

25. Reference made by the learned 3rd Ad-hoc Addl. Sessions Judge Nashik in Confirmation case no.2 of 2006 is answered in terms of the above order and Criminal Appeal No.590 of 2006 is partly allowed in terms of the above order.

26. Mr.Mundargi, the learned Senior Counsel appearing for the accused submitted an oral application on behalf of accused nos.1, 2 and 4 praying for suspension of the order of death sentence so as to enable the said accused to approach the Apex Court under Article 136 of the Constitution.

. In view of the scheme of Section 415 of Cr.P.C., the oral application is allowed and it is directed that the execution of the sentence of death of accused nos.1, 2 and 4 shall stand suspended for a period of three months from today.

(R.S.MOHITE,J.) (B.H.MARLAPALLE,J.)